

1 Plaintiff with a new notice of default and proceeded with a new foreclosure. The trustee's
2 sale in that foreclosure took place September 30, 2010.

3 Plaintiff's current cause of action for "wrongful foreclosure/breach of contract" still
4 continues to challenge the *first* foreclosure, *i.e.*, the foreclosure that Defendants unwound.
5 Plaintiff argues that the cause of action remains viable in her new complaint because,
6 "[r]egardless of whether the second attempt to take her home was legal . . . defendants cannot
7 shed their initial liability by backing up and running over her the right way." (Doc. 107 at
8 2.) That "initial liability," says Plaintiff, comprises the attorneys' fees and emotional distress
9 she incurred in attempting to challenge the first foreclosure.

10 Concerning attorneys' fees, Plaintiff appears to believe that her first claim for
11 wrongful foreclosure/breach of contract and Defendants' subsequent rescission of the first
12 trustee's sale makes her a "successful party" within the meaning of the Arizona statute that
13 permits an award of attorneys' fees in contract-based actions. *See* A.R.S. § 12-341.01. But
14 Plaintiff has not moved for attorneys' fees. *See* LRCiv 54.2 (governing procedure for
15 seeking attorneys' fees). Nor has Plaintiff cited any authority showing that attorneys' fees
16 incurred defending the first foreclosure can be claimed as damages after the first foreclosure
17 has become moot. Plaintiff's request for attorneys' fees therefore does not support her
18 wrongful foreclosure/breach of contract cause of action.

19 Concerning emotional distress damages, Plaintiff has pleaded a contract-based cause
20 of action and therefore cannot recover non-economic damages, such as for emotional
21 distress. *Country Escrow Serv. v. Janes*, 121 Ariz. 511, 513, 591 P.2d 999, 1001 (Ct. App.
22 1979). Accordingly, this remedial request does not validate a continuing wrongful
23 foreclosure/breach of contract cause of action.

24 IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss Plaintiff's Third
25 Amended Complaint (Doc. 106) is GRANTED. This dismissal is without prejudice to a
26 subsequent motion to amend under Rule 15(a)(2), but Plaintiff must file such a motion, if
27 desired, by December 10, 2010. Otherwise, Plaintiff's claims against Defendants JL
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1 Financing and RG Financing will be dismissed with prejudice and without further notice to
2 Plaintiff.

3 DATED this 9th day of November 2010.

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5 /s/ JOHN W. SEDWICK
6 UNITED STATES DISTRICT JUDGE
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